No. 29

In the Supreme Court of the United States

OCTOBER TERM, 1953

THE UNITED STATES, PETITIONER

v.

KOPPERS COMPANY, INC., SUCCESSOR BY MERGER TO KOPPERS UNITED COMPANY AND SUBSIDIARIES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled cause on December 1, 1953.

OPINION BELOW

The opinion of the Court of Claims (R. 14-25), entered December 1, 1953, is not yet officially reported.

JURISDICTION

The opinion and judgment of the Court of Claims were entered December 1, 1953. (R. 24.)

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255(1).

QUESTION PRESENTED

Whether the Government is entitled to interest on the full amount of deficiencies of excess profits taxes from the time the returns were due, where the deficiencies were diminished by reason of the allowance of relief under Section 722 of the Internal Revenue Code, or on only the net amounts of the deficiencies after allowance of Section 722 relief.

STATUTES INVOLVED

The applicable portions of the pertinent statutes are set forth in the Appendix, *infra*, pp. 15-22.

STATEMENT

The findings of fact of the Court of Claims may be summarized as follows:

The taxpayer [1] is a corporation which filed its excess profits tax returns for 1940 and 1941 and later filed amended returns for such years and paid the income and excess profits taxes shown due thereon. These returns were made and the taxes computed without the application of Section 722 of the Internal Revenue Code, which provides relief for any taxpayer who establishes that in the particular circumstances the computation of the excess profits tax is "excessive and discriminatory" (*infra*, p. 17). (R. 25-26.)

[1] Both the Koppers United Company and the Koppers Company, its successor, are referred to as the taxpayer for convenience.

On September 15, 1943, the taxpayer filed applications for relief under Section 722 of the Internal Revenue Code for the years 1940 and 1941. Amended applications were filed on September 10, 1945 and November 20, 1945. (R. 26.)

On December 16, 1950, the taxpayer executed an agreement as to the amount of constructive average base period net income under Section 722 for the years 1940 and 1941, which amounts were approved on January 10, 1951, by the Excess Profits Tax Council of the Bureau of Internal Revenue (now the Internal Revenue Service). (R. 26.)

At various times the Internal Revenue Agent in Charge at Pittsburgh forwarded to taxpayer copies of Revenue Agents' reports covering examination of its excess profits tax returns for 1940 and 1941. In one of these reports dated February 9, 1951, there was proposed a deficiency for 1940 of $260,554.39 and for 1941 of $95,749.33. These amounts reflected the deficiencies after the relief allowable under Section 722 as determined by the Excess Profits Tax Council. (R. 27.)

On February 14, 1951, taxpayer filed a waiver on Treasury Form 874 consenting to the assessment and collection of deficiencies in tax for 1940 and 1941, in the respective amounts of $260,554.39 and $95,749.33. (R. 27.)

In computing the proposed deficiencies referred to above, the Commissioner of Internal Revenue, in accordance with the usual administrative practice of the Internal Revenue Service, first computed the excess profits tax liability for each of the

years 1940 and 1941 without the allowance of any relief provided by Section 722 and determined deficiencies as the result of such computation in the amounts of $460,408.91 for 1940 and $426,730.95 for 1941. (See affidavit of Mr. McLaughlin attached to the Government's motion for summary judgment.) After these computations had been made, the Commissioner gave effect to the relief allowable under Section 722 which reduced the excess profits tax liability for 1940 and 1941 and resulted in a balance of excess profits tax due for 1940 of $260,554.39 and for 1941 of $95,749.33. On March 8, 1951, the Commissioner issued a statutory notice of deficiencies in the amounts just stated. (R. 27-28.)

The Internal Revenue Service computed interest for the years 1940 and 1941 as follows: For the year 1940, interest in the sum of $217,376.07 was computed upon $460,408.91 for the period beginning March 15, 1941 (which was the due date of the 1940 return), to January 28, 1949 (which was treated as the date of payment of the deficiency of $260,-554.39); and for the year 1941, interest in the sum of $230,504.86 was computed upon $426,730.95 for the period beginning March 15, 1942 (which was the due date of the 1941 return), to March 16, 1951 (which was 30 days after the waiver of February 14, 1951, was filed). (R. 28.)

On April 17, 1951, pursuant to the waiver filed February 14, 1951, the Commissioner assessed deficiencies in excess profits taxes of $260,554.39 for

1940 and $95,749.33 for 1941 and at the same time assessed interest of $217,376.07 for 1940 and $230,504.86 for 1941. These amounts of tax and interest were paid in full by the taxpayer to the Collector at Pittsburgh. (R. 28-29.)

Claims for refund were filed, claiming refunds of interest paid of $94,358.71 for 1940 and $178,784.48 for 1941. The amounts claimed, with one minor adjustment, represent the excess of the interest paid over the amount of interest due on that portion of the deficiencies which were actually assessed. These claims were based upon the ground that the claimed interest was erroneously and illegally collected upon an amount not determined as a deficiency in accordance with Section 292(a) of the Internal Revenue Code. These claims were rejected and this suit instituted in the Court of Claims within two years of such rejection. (R. 29.)

Upon the above facts the Court of Claims held that the taxpayer was entitled to recover the interest sued for and entered judgment for the taxpayer in the amount of $270,216.34, together with interest thereon as provided by law. (R. 29.)

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Claims, allowing the taxpayer to recover interest paid on deficiencies in excess profits taxes for the years 1940 and 1941, is in direct conflict with that of the Court of Appeals for the Fifth Circuit in *United States* v. *Premier Oil Refining Co.*, decided January 6, 1954

(1954 P-H, par. 72,289).[2] In the latter case the Court of Appeals expressly stated its agreement with the dissenting opinion in the instant case.

The excess profits tax as imposed by the Second Revenue Act of 1940, c. 757, 54 Stat. 974, was based on a percentage of adjusted excess profits net income. In arriving at such adjusted excess profits net income a credit was allowed which was computed on either the income credit method or the invested capital credit method. In the income credit method the credit was a certain percentage of the average base period net income, i.e., the average annual income of a certain prior base period. Section 722 of the Internal Revenue Code, Appendix, *infra*, pp. 17-22, was enacted primarily to provide relief for certain taxpayers where the use of the annual base period net income or the statutory invested capital resulted in an excessive or discriminatory tax. Section 722(a), Appendix, *infra*, pp. 17-18, provides that in any case where the taxpayer (1) establishes that the tax computed otherwise is an excessive and discriminatory tax and (2) establishes what would be a fair and just amount representing normal earnings for the base period, the tax shall be determined by using such constructive average base period net income in lieu of the statutory average base period net income.

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[2] A petition for rehearing has been filed by the taxpayer in the *Premier Oil* case. That case involved the years 1943, 1944 and 1945, and the petition for rehearing raises one issue on the facts for 1944 and 1945, which is not involved in the instant case. In so far as the year 1943 is concerned, the question is identical with that presented in the instant case.

Section 722(d), Appendix, *infra*, pp. 21-22, provides that the taxpayer shall compute its tax, file its return, and pay the tax shown due thereon without the application of Section 722, and that the benefits of Section 722 shall not be allowed unless the taxpayer within a certain time makes application therefor in accordance with regulations prescribed by the Commissioner of Internal Revenue.

In the instant case, the taxpayer filed its returns and paid the taxes shown due thereon. However, the returns did not reflect the correct tax due and the Commissioner of Internal Revenue, after examination and audit, determined deficiencies in excess profits taxes for the years 1940 and 1941, in the respective amounts of $460,408.91 and $426,730.95, resulting from adjustments to income for each year other than adjustments under Section 722. Prior to the actual assessment of these deficiencies, in accordance with Section 272(a) of the Internal Revenue Code, Appendix, *infra*, pp. 15-16, it had also been determined that the taxpayer was entitled to relief under Section 722 of the Internal Revenue Code. The allowance of this relief reduced the amounts of the deficiencies and the Commissioner assessed deficiencies for those years in only the net amounts of $260,554.39 for 1940, and $95,749.33 for 1941. The taxpayer agreed to the assessment of the deficiencies in these amounts. The Commissioner of Internal Revenue, in accordance with his usual practice, computed and assessed interest on the total amounts of the de-

ficiencies before allowance of Section 722 relief, which was duly paid.[3]

The basis of the Court of Claims decision is that since the constructive average base period net income when finally determined is used to *determine* the tax liability rather than to merely offset the result of computations based on the statutory average base period net income, the Commissioner of Internal Revenue must take cognizance of Section 722 in "determining" a deficiency and that it is only the amount of the deficiency remaining after such computation which is a real deficiency within the meaning of the statute. It concluded that there is no statutory authority in the Commissioner to collect interest on any amount in excess of the amount of the deficiency actually assessed. On the other hand, the Court of Appeals for the Fifth Circuit in the *Premier Oil* case held that a deficiency determined before the allowance of relief under Section 722 was a real deficiency even though not assessed, that Section 272(a) does not require a separate formal notice of determination and assessment of an extinguished deficiency, and that the taxpayer could not recover the interest paid on such extinguished deficiencies.[4]

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[3] Taxpayer conceded that it owed the interest on the amounts of the deficiencies actually assessed. It is only the interest on the difference between the total amounts and the net amounts that is in controversy.

[4] In two of the years before the Court of Appeals the allowance of relief under Section 722 extinguished the deficiency in full, resulting in an overassessment of tax. This factual difference is not material. Cf. *Henry River Mills Co.* v. *United States*, 96 F. Supp. 477 (C. Cls.), in which the allowance of

As already stated the facts in the *Premier Oil* case, at least with respect to the year 1943, are for all practical purposes identical with those in the instant case. Although the Court of Claims refers to the deficiencies as "potential" deficiencies never "determined" under the statute (R. 23), it has found that the Commissioner "computed" the excess profits tax liability for each year prior to the allowance of Section 722 relief. (R. 27.) The facts, which are undisputed,[5] show a "determination" of a deficiency for each of the years involved as that term is used in the *Premier Oil* case. The Court of Appeals in that case refused to accept the finding of the District Court for the Northern District of Texas, which had decided the case in favor of the taxpayer (107 F. Supp. 837), that the deficiencies were never determined and after referring to the record, which consists mainly of the pleadings, exhibits and affidavits, concluded that there was a determination of a deficiency for each of the years involved.[6] The court relied upon an

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relief under Section 722 extinguished the deficiency *in toto*, resulting in an overassessment and which the court below in the instant case regarded as involving identical facts. (R. 20-21.)

[5] Prior to the reference of this case by the Court of Claims to a Commissioner, the Government had filed a motion for summary judgment accompanied by affidavits and exhibits. At the hearing before the Commissioner of the Court, it was stipulated that if the affiants were called to testify they would testify in accordance with the affidavits, the taxpayer reserving the right to argue that the words "deficiency" and "determination" as used in the affidavits were conclusions of law and not facts. (R. 30-31.)

[6] The question of whether the deficiencies were "computed" or "determined" may not be material particularly if this Court adopts the view of the Court of Appeals that "Section 272(a)

affidavit of an Abnormality Claims Reviewer in the Collection Division of the Internal Revenue Service, which affirmatively showed that the Commissioner made a determination of a deficiency for each year, prior to the allowance of relief under Section 722. In the instant case, an affidavit attached to the Government's motion for summary judgment, executed by an Abnormality Claims Reviewer in the same Division, shows that the deficiencies were determined prior to the allowance of Section 722 relief in the total amounts upon which the interest was assessed. (R. 33-34; see also Exs. I and J attached to the Government's motion for summary judgment (R. 35-38A).)

2. The decision below is in conflict, in principle, with the decision of this Court in the case of *Manning* v. *Seeley Tube & Box Co.*, 338 U.S. 561. The *Seeley* case involved income and excess profits tax deficiency for the year 1941, which, together with interest, was assessed and paid and later eliminated as a result of a net operating loss carry-back from the year 1943. This Court held that the Government was entitled to retain the interest assessed even though as a result of a net loss carry-back the deficiency was later eliminated in full, resulting in an overpayment for 1941, upon the basic theory

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does not specifically require a separate formal notice of determination and assessment of an extinguished deficiency." See also *Surface Combustion Corp.* v. *United States* (N.D. Ohio), decided November 25, 1953 (1953 P-H, par. 72,804), now on appeal to the Court of Appeals for the Sixth Circuit, where the District Court allowed the taxpayer to recover interest paid on an assessed deficiency which was later extinguished by allowance of relief under Section 722.

that the statute contemplated that the taxpayer should return and pay the correct amount of tax regardless of the net loss sustained in a later year and that the Government should not be deprived of the interest rightfully due it because of failure on the part of the taxpayer to return and pay the correct tax.[7] This Court stated in the *Seeley Tube* case (338 U.S. 561, 566): "For that period the taxpayer, by its failure to pay the taxes owed, had the use of funds which rightfully should have been in the possession of the United States. The fact that the statute permits the taxpayer subsequently to avoid the payment of that debt in no way indicates that the taxpayer is to derive the benefits of the funds for the intervening period." The same is true of the instant case. As Judge Madden, dissenting below, stated (R. 24): "If the plaintiff had done what the statute expressly requires, the Government would have had the money, the interest on which is here in question, until the amount of relief to which the plaintiff was entitled

[7] This Court in the *Seeley* case refused to decide whether a different result would be reached where the loss was claimed before the assessment of the deficiency. However, the Court of Claims itself held in the case of *Rodgers* v. *United States*, 108 F. Supp. 727, decided after the *Seeley* case, that the Government could rightfully collect interest on a deficiency determined but not assessed due to the fact that prior to the actual assessment thereof it was extinguished by a net loss carry-back. The Court of Appeals for the Sixth Circuit reached the same result in *Cumberland Portland Cement Co.* v. *United States*, 202 F. 2d 152, affirming *per curiam* the decision of the District Court for the Middle District of Tennessee (101 F. Supp. 577), as did the District Court for the Western District of Tennessee in *DeSoto Hardwood Flooring Co.* v. *United States*, decided December 20, 1950 (1951 P-H, par. 72,371). Cf. *Surface Combustion Co.* v. *United States*, *supra*.

under the provisions of Section 722 (a), (b), and (c), was worked out between the taxpayer and the Government. The simple fact is that the plaintiff failed to pay the tax which the statute imposed and required, and that there was, in fact, a deficiency, which persisted until it was finally learned what relief the plaintiff was entitled to."

The majority opinion of the Court of Claims in the instant case held that the *Seeley* case is distinguishable upon the ground that in the net loss situation Section 122 of the Internal Revenue Code (which defines a net operating loss) is designed to become operable after some economic reversal in a future taxable period, while Section 722 is operable, if at all, from the time the return is filed.[8] Judge Madden in his dissenting opinion (R. 24-25), after referring to the "mandate of Section 722(d)" that the taxpayer shall file its return and pay the tax without the application of that section, stated that any difference between the instant case and cases like *Seeley Tube* and *Rodgers* v. *United States*, 108 F. Supp. 727 (C. Cl.) "is, as a practical matter, more apparent than real". After referring to the provisions of Sections 722 and 3771(g) of the Internal Revenue Code,[9] he concluded that

[8] But see *Standard Roofing & Material Co.* v. *United States*, 199 F. 2d 607, where the Court of Appeals for the Tenth Circuit held the *Seeley* case controlling and that the Government was entitled to retain interest collected on a deficiency later eliminated in part as the result of renegotiation proceeding, being of the opinion that the fact that two years were involved in the *Seeley* case and only one there was immaterial.

[9] Section 3771(g) restricts interest on overpayments resulting from the allowance of relief under Section 722. Parallel provisions in Section 3771(e) restricting interest on overpay-

these provisions "show the intention of Congress that the money is intended to be collected and held by the Government, as of right, until the question of Section 722 relief is settled." (R. 25.) The Court of Appeals for the Fifth Circuit in the *Premier Oil* case expressly stated its agreement with the dissenting opinion of Judge Madden in the present case.

3. The question is one of considerable and continuing importance in the administration of the federal tax law. Although the excess profits tax was repealed by the Revenue Act of 1945, c. 454, 59 Stat. 556, Section 122(a), effective for years beginning after December 31, 1945, there are still a large number of claims pending before the Internal Revenue Service, as well as suits filed in the Court of Claims and the District Courts, involving this issue.[10] The amount involved in suits already filed is approximately one and one-half million dollars. As already stated, an appeal has been filed with the Court of Appeals for the Sixth Circuit in the *Surface Combustion* case. The District Court for the Southern District of Florida in *Kader Citrus Pulp Co.* v. *United States*, decided March 16, 1953 (1953 P-H, par. 72,487), decided the identical issue in favor of the taxpayer. The

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ments resulting from net operating loss carry-backs were regarded as significant and persuasive by this Court in reaching its decision in the *Seeley* case. (Cf. *Seeley*, pp. 567-568.)

[10] Some of these claims and suits involve interest on assessed deficiencies. However, in view of the decisions in the cases of *Rodgers*; *Cumberland Portland Cement*; and *Surface Combustion*, *supra*, the question of whether the deficiency was actually assessed or not seems immaterial.

Government's motion for rehearing in that case is still pending. In addition, about four thousand claims are pending before the Excess Profits Tax Council and the Tax Court for allowance of relief under Section 722. The same question will, therefore, undoubtedly arise in the case of some of these taxpayers after their claims under Section 722 are finally determined.

CONCLUSION

For the reasons stated, it is submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

MARCH 1954.

APPENDIX

Internal Revenue Code:

SEC. 271. DEFINITION OF DEFICIENCY.

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(b) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

(26 U. S. C. 1946 ed., Sec. 271.)

SEC. 272. PROCEDURE IN GENERAL.

(a)(1) *Petition to Board of Tax Appeals.*— If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered

mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final.

* * * * *

(26 U. S. C. 1946 ed., Sec. 272.)

SEC. 292. INTEREST ON DEFICIENCIES.

Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272(d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier.

(26 U. S. C. 1946 ed., Sec. 292.)

SEC. 722 [as added by Sec. 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, and amended by Sec. 222(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, and the Act of December 17, 1943, c. 346, 57 Stat. 601]. GENERAL RELIEF—CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME.

(a) *General Rule.*—In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. In determining such constructive average base period net income, no regard shall be had to events or conditions affecting the taxpayer, the industry of which it is a member, or taxpayers generally occurring or existing after December 31, 1939, except that, in the cases described in the last sentence of section 722(b)(4) and in section 722(c), regard shall be had to the change in the character of the business under section 722(b)(4) or the nature of the taxpayer and the character

of its business under section 722(c) to the extent necessary to establish the normal earnings to be used as the constructive average base period net income.

(b) *Taxpayers Using Average Earnings Method.*—The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 713, if its average base period net income is an inadequate standard of normal earnings because—

(1) in one or more taxable years in the base period normal production, output, or operation was interrupted or diminished because of the occurrence, either immediately prior to, or during the base period, of events unusual and peculiar in the experience of such taxpayer,

(2) The business of the taxpayer was depressed in the base period because of temporary economic circumstances unusual in the case of such taxpayer or because of the fact that an industry of which such taxpayer was a member was depressed by reason of temporary economic events unusual in the case of such industry,

(3) the business of the taxpayer was depressed in the base period by reason of conditions generally prevailing in an industry of which the taxpayer was a member, subjecting such taxpayer to

(A) a profits cycle differing materially in length and amplitude from the general business cycle, or

(B) sporadic and intermittent periods of high production and profits, and such periods are inadequately represented in the base period,

(4) the taxpayer, either during or immediately prior to the base period, commenced business or changed the character of the business and the average base period net income does not reflect the normal operation for the entire base period of the business. If the business of the taxpayer did not reach, by the end of the base period, the earning level which it would have reached if the taxpayer had commenced business or made the change in the character of the business two years before it did so, it shall be deemed to have commenced the business or made the change at such earlier time. For the purposes of this subparagraph, the term "change in the character of the business" includes a change in the operation or management of the business, a difference in the products or services furnished, a difference in the capacity for production or operation, a difference in the ratio of nonborrowed capital to total capital, and the acquisition before January 1, 1940, of all or part of the assets of a competitor, with the result that the competition of such competitor was eliminated or diminished. Any change in the capacity for production or operation of

the business consummated during any taxable year ending after December 31, 1939, as a result of a course of action to which the taxpayer was committed prior to January 1, 1940, or any acquisition before May 31, 1941, from a competitor engaged in the dissemination of information through the public press, of substantially all the assets of such competitor employed in such business with the result that competition between the taxpayer and the competitor existing before January 1, 1940, was eliminated, shall be deemed to be a change on December 31, 1939, in the character of the business, or

(5) of any other factor affecting the taxpayer's business which may reasonably be considered as resulting in an inadequate standard of normal earnings during the base period and the application of this section to the taxpayer would not be inconsistent with the principles underlying the provisions of this subsection, and with the conditions and limitations enumerated therein.

(c) *Invested Capital Corporations, Etc.*— The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer, not entitled to use the excess profits credit based on income pursuant to section 713, if the excess profits credit based on invested capital is an inadequate standard for determining excess profits, because—

(1) the business of the taxpayer is of a

class in which intangible assets not includible in invested capital under section 718 make important contributions to income,

(2) the business of the taxpayer is of a class in which capital is not an important income-producing factor, or

(3) the invested capital of the taxpayer is abnormally low.

In such case for the purposes of this subchapter, such taxpayer shall be considered to be entitled to use the excess profits credit based on income, using the constructive average base period net income determined under subsection (a). For the purposes of section 713(g) and section 743, the beginning of the taxpayer's first taxable year under this subchapter shall be considered to be that date after which capital additions and capital reductions were not taken into account for the purposes of this subsection.

(d) *Application for Relief Under This Section.*—The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, except as provided in section 710(a)(5). The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to the amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. If a constructive average base period net income has

been determined under the provisions of this section for any taxable year, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for the purpose of determining the tax under this subchapter for a subsequent taxable year.

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(26 U.S.C. 1946 ed., Sec. 722.)

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